SELVAMARY P. SATIANATHAN

v.

G. RETHINASAMY

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-196-1989]
19 NOVEMBER 1990

CIVIL PROCEDURE: *Proceedings in relation to complaint made to Bar Council - Whether Bar Council has to be cited as a party to the proceedings - Plaintiff's rights to sue whom he wants - Discretion of Court - Order 53 r. 2(3) Rules of the High Court 1980 - Section 103 Legal Profession Act 1976.*

The appellant S had complained to the Bar Council (BC) under s. 95 of the Legal Profession Act 1976 (LPA) against the solicitor respondent R over an alleged impropriety while acting as a solicitor in a sale and purchase agreement. The BC decided that a formal enquiry into the complaint was unnecessary. S then filed proceedings under s. 103(2) of the LPA.

R raised two preliminary objections namely:

(a) that the failure of S to cite BC as a party to the proceeding was fatal and that;

(b) since the appeal was out of time, it ought to be dismissed *in limine*.

The learned Judge held that under s. 103(2) of the LPA and O. 53 r. 2(3) Rules of the High Court 1980 the Malaysian Bar should be made a respondent; in relation to (b), the learned Judge held that the appeal was not properly brought before the Court as the time limited for appealing under s. 103(1) of the LPA had long expired.

The appellant appeals on both (a) and (b).

Held:

[1] (a) At common law, a plaintiff is entitled to pursue his remedy against a defendant and to leave out persons against whom he does not wish to proceed.

(b) Order 15 r. 6(2) of the Rules of the High Court 1980 give the Court wide powers and wide discretion to either add or substitute a party to an action.

(c) Since there is nothing to prevent any party interested to apply to the Court at any stage of the proceeding to add the BC as a defendant, there is no reason whatsoever for the preliminary objection to be raised at this stage for it would be an exercise in futility for the Court to answer the question raised in the objection since the discretion of the Court is yet to be exercised at the proper time.

[2] Section 103(2) of the LPA requires the BC to be served; the BC is thus given adequate notice to be prepared and if necessary, to file and affidavit to express its views in order to protect its interest.

[3] In an appeal to the High Court against the decision of a subordinate tribunal, the tribunal itself is never made a party to the proceeding and it is never the practice in regard to appeals under O. 55 of the Rules of the High Court 1980 to cite the subordinate tribunal as a party; in addition subordinate authorities where decisions are appealed should not be made a party to the proceeding.

[4] Under s. 103(3), all that is required is that the BC be served with the documents; it is against all canons of construction to suggest that the subsection imposes a further requirement that the BC be also made a party.

[Appeal on (a) allowed; Appeal on (b) dismissed]

Cases referred to:
Dollfus Mieg Et Compagnir S.A. v. Bank of England [1951] 1 Ch 33
McCheane v. Gyles [1902] 1 Ch 911
Moser v. Marsden [1892] 1 Ch 487
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52
Squibb United Kingdom Staff Association v. Certification Officer [1979] 2 All ER 452
Wilson v. Church [1878] 9 Ch D 552
Yii Suok Ting v. Sibu Municipal Council [1986] 1 MLJ 232

Legislation referred to:
Legal Profession Act 1976, ss. 103, (1), (2), (3)
Rules of the Supreme Court [UK], O. 53
Rules of the High Court 1980, O. 15 r. 6(2), O.53,O.53 r.2(3),O.55,O.52 r.1(2)

Other source referred to:
Judicial Review: Law & Procedure, R.J.F. Gordon, p. 92

For the appellant - G.S. Nijar (M. Thayalan with him); M/s. Meena, Thayalan & Partners
For the respondent - R.J. Manecksha; M/s. Ong & Manecksha
For the Bar Council - P.R. Manecksha (Hj. Sulaiman with him) holding a Watching Brief; M/s. V.P. Nathan & Partners
For the applicant - G. Sri Ram holding a Watching Brief; M/s. Sri Ram & Co.

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

Before the learned Judge of the High Court was an appeal under s. 103 of the Legal Profession Act 1976 (LPA). The appellant was the complainant who had made a complaint under s. 95 of the LPA against the solicitor (the respondent here) over an alleged impropriety while acting as solicitor for her in a sale and purchase agreement. The Bar Council however decided that a formal enquiry into her complaint was not necessary. The appellant then filed the originating summons pursuant to s. 103(2) of the LPA.

Section 103 of the LPA reads as follows:

> 103 Appeal to High Court
>
> (1) A person who has made a complaint under s. 95(1) and who is dissatisfied with the findings of the State Bar Committee or of the Inquiry Committee or with the determination of the Bar Council on the complaint may, within fourteen days of receiving the notification under s. 98(c), appeal to a Judge of the High Court against such finding or determination or both.

(2) The appeal shall be by way of originating summons and shall be accompanied by an affidavit of the facts constituting the basis of the complaint and by a copy of the complaint originally made to the Bar Council, together with a copy of the notification mentioned in s. 98(c).

(3) A copy of each of the documents referred to in subsection (2) shall be served on the Bar Council.

At the outset of the proceeding before the learned Judge of the High Court the respondent raised a two-pronged preliminary objection - firstly, that the Bar Council whose decision was the subject of the appeal should have been but not cited as a party to the proceeding which omission was said to be fatal to the action; and secondly, since the period for appealing had long expired the appeal was incompetent and ought to be dismissed *in limine*.

The answer of the appellant to the first point was simply that according to s. 103(3) of the LPA the Bar Council need only be served but not cited as a party and the omission was at its worst a non-joinder and not fatal to the action. The appellant's answer to the second point was that the appeal had under the circumstances already been "brought" and the fourteen day limit had therefore no application.

The learned Judge upheld the preliminary objection on the first point. What the learned Judge did here was to read into s. 103 of the LPA the requirement that the Bar Council must be served **and** the Malaysian Bar should be made a respondent. His argument for this proposition is stated in his judgment at pp. 12 and 13 of the appeal record:

> I would respectfully adopt the views of Mr. Gordon and hold that when our O. 53 r. 2(3) provides that the notice of summons must be served on all persons directly affected it means that such persons are required to be made respondents to the proceedings.
>
> I would, at this point, interpolate to mention by way of explanation, that whilst the Bar Council is by definition the Central Council of the Malaysian Bar, established under s. 47 of the Act, it is a purely executive body charged with the responsibility of the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions and not therefore a legal entity. Accordingly, it is **not** the Bar Council but the Malaysian Bar which must be made a respondent to the present appeal.

The learned Judge was clearly persuaded by the view of Mr. R.J.F. Gordon in his book on *(Judicial Review: Law and Procedure)*, p. 92 when discussing O. 53 of the Rules of the Supreme Court. It is to be noted however that the English O. 53 carries provisions for judicial review and is a liberalised version of O. 53 of our Rules of the High Court 1980. Mr. Gordon, when discussing O. 53, was of the view that all persons "directly affected" are required to be made respondents in the proceeding.

There is no denying that the learned Judge made an indepth study of the issue raised. One of the things which however cannot escape our attention in this regard is the fundamental principle affecting the right of a plaintiff to sue. Generally at common law a plaintiff is entitled to pursue his remedy against a defendant. He cannot be compelled to proceed against other persons whom he has no desire to sue. *Prime facie* the plaintiff is entitled to choose the person against whom to proceed and to leave out persons against whom he does not wish to proceed. This principle was approved by Wynn-Parry J in *Dollfus Mieg Et Compagnir S.A. v. Bank of England* [1951] 1 Ch 33. One exception to this general rule was described by Buckley J in *McCheane v. Gyles* [1902] 1 Ch 911 (No .2) at p. 915:

In a representative action - an action brought by one or more persons purporting to represent a class - one of the class may come forward and say, "The plaintiff does not represent me. Add me as a defendant." In that case the applicant may be added although the plaintiff objects.

Order 15 r. 6(2) of the Rules of the High Court 1980 provides that at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely:

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

The rules give wide powers and a wide discretion to the Court which it may exercise at a proper time. Buckley J applied the principle in *McCheane v. Gyles* where the defendant was a trustee sued for breach of trust desired to bring in the legal personal representative of a woman who had been his co-trustee. The head note to the case reads:

G. and C. were the trustees of a settlement. C. died, and X., his legal personal representative, lived in Ireland. M., the *cestui que* trust, brought an action against G., alleging a breach of trust by him and C., and claiming payment by G. of the amount lost by the breach. A third-party notice, by which G. claimed contribution from the estate of C., and the order giving leave to serve it on X. in Ireland, were set aside by the Court of Appeal without prejudice to an application by G., under O. XVI., r. 11, to add X. as a defendant to the action" *McCheane v. Gyles*, ante, p. 287.

On the application to add X being made, it was opposed by the plaintiff:

Held, that X. ought not to be added as a defendant against the plaintiff's wish.

Buckley J said at p. 917:

Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined", or that his "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

Moser v. Marsden [1892] 1 Ch 487 was an ordinary action to restrain an alleged infringement of the plaintiff's patent by the defendant Marsden. The manufacturer of the defendant's machine applied to be added as defendant alleging that the judgment in the action would injure him, and the defendant could not efficiently defend the action. On appeal Lindley LJ considered the principle and said at p. 489:

There may be a score of persons like Marsden using this particular machine, but there is no law or equity to oblige the plaintiff to sue all of them.

Referring to the rule under which the application was made His Lordship said:

> Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not.

In *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52 the Privy Council held that the sublessees being parties to an agreement were necessary parties to any action brought to enforce the agreement. The speech of Lord Diplock also emphasised the need for a "flexibility of approach" in the exercise of the discretion of the Court to add or substitute a party to an action.

The crux of the matter here is that since there is nothing to prevent any party interested to apply to the Court at any stage of the proceeding to add the Bar Council (or the Malaysian Bar for that matter) as a defendant there is no reason whatsoever for the preliminary objection to be raised at this stage for it would be an exercise of futility for the Court to answer the question raised in the objection since the discretion of the Court is yet to be exercised at the proper time.

In *Wilson v. Church* [1878] 9 Ch D 552 one of the principal questions was whether a defendant (Church) was improperly joined and should be struck out as being only a formal defendant and made so for the purpose of discovery. When referring to the rule applicable (the equivalent of the first limb of our O. 15 r. 6(2)) Jessel MR said at pp. 557 - 588:

> Now there is no doubt that the Court may do so now because it may do it at any stage of the proceedings. If you came to the trial it would be absurd to strike him out, because you would dismiss the action. What it means is this, if at any stage an application is made to strike him out, and it is proper to strike him out, of course the Court will strike him out. In the same way, if there are parties who ought to have been joined, the Court may order a plaintiff or defendant to be joined, or added. Then, if it is brought before the Court at the proper time, and if it is in time, of course the Court may do it if it thinks proper. But it is absurd to say that the Court "may" do so, if it did not mean that it was the duty of the Judge to add the party if the proceedings were in such a state that the party could properly be added. The legislature were obliged to say "may", because it might be at any stage of the proceedings.

The provision we are concerned with here that is, s. 103(3) of the LPA already requires the Bar Council to be served. This is a provision in the nature of O. 52 r. 1(3) of the Rules of the High Court 1980 where the notice of the application for leave is required to be served on the Attorney General although he is not a party to the proceeding. The Bar Council is thus given adequate notice to be prepared and if necessary, to file an affidavit to express its views in order to protect its interest. It may even apply to be added as a party but that is entirely up to the Bar Council to decide. The argument on the distinction between the Bar Council and the Malaysian Bar may well be taken at that proceeding.

At the request of the Bar Council the Court was reconvened on 29 October 1990 to hear further submission on the first preliminary point on behalf of the Bar Council. It was clear that by this time the Bar Council had changed its stand and it is now their argument that the Bar Council should not be made a party to the proceeding in this case.

It is the Bar Council's contention now that the position of the Bar Council in this context is akin to that of a subordinate tribunal. It is common practice that in an appeal against the decision of a subordinate tribunal the tribunal itself is never made a party to the proceeding.

That is indeed a correct proposition in relation to appeals to the High Court from subordinate tribunals and it is never the practice in regard to appeal under O. 55 of the Rules of the High Court to cite the subordinate tribunal as a party.

It is also the contention of the Bar Council that in the context of the decision appealed against the Bar Council was in the position of a judicial authority. The judgment of this Court in *Yii Suok Ting v. Sibu Municipal Council* [1986] was cited. There it was a proceeding for mandamus and *certiorari* when leave had already been granted to challenge the decision of the Deputy Chairman of the Sibu Municipal Council in refusing to renew a permit to trade allegedly based on political bias and bad faith. The allegations of bias and bad faith were denied in the affidavit of the Deputy Chairman. The applicant applied for the attendance in Court of the Deputy Chairman and one other official purportedly to cross-examine them on their affidavits. The High Court Judge refused the application and this Court dismissed the appeal and held that:

> Courts are unwilling to permit a person in a judicial position to be subjected to cross-examination as if he were a party to the proceedings.

That decision is of course based on the principle that the subordinate authority should not be made a party to the proceeding.

In *Squibb United Kingdom Staff Association v. Certification Officer* [1979] 2 All ER 452 a similar application to cross-examine the certification officer in respect of his refusal to grant a certificate that an association was not an independent trade union under the U.K. Trade Union and Labour Relations Act 1974. What Lord Denning MR said at p. 457 is quite relevant to get our perspective right in the present appeal:

> No doubt on any appeal there is a public interest involved. **So there should be someone present to support the decision of the certification officer**. In a criminal case the public interest is represented by the Crown. In one of these cases I think the public interest should be safeguarded by the Treasury Solicitor. The regulations provide that any party can be added such as the appeal tribunal thinks right. The Treasury Solicitor should be made a party and instruct Counsel, not to represent the certification officer, but to represent the public interest. He should call any evidence which he thinks will be of assistance to the appeal tribunal and put forward any submissions which he thinks proper to be considered.
>
> It seems to me, therefore, that in future, instead of the Treasury Solicitor coming on behalf of the certification officer, he should come almost as a friend of the appeal tribunal to look into the facts and bring all material matters before the appeal tribunal. I do not suggest that the certification officer can never be called as a witness. He might be called, or his investigating officers might be called, so as to show what enquiries he made and what information he had before him; and he should produce any of the material which he considered. **I do not think he should be regarded as an opposing party to be cross-examined on the validity of his reasons.**
>
> (Emphasis is mine)

Finally s. 103 of the LPA is a statutory provisions for appeal. The appeal can be against the decision of the State Bar Committee or the Inquiry Committee or the Bar Council. In every one of these appeals the Bar Council is required to be served with the documents. Section 103(3) requires only a literal reading and it is against all cannons of construction to suggest that the subsection imposes a further requirement that the Bar Council be also made a party.

There is no doubt therefore that the action in the present case is properly constituted and non-citing of the Bar Council does not affect the validity of the action. The appeal on the first issue is accordingly allowed.

As regards the question of expiry of the period of appeal we agree with the conclusion of the learned Judge that under s. 103(1) of the LPA a complainant has fourteen days from the date of receipt of the Bar Council's decision within which to appeal if he is dissatisfied with the decision. But there is no provision in the LPA for the Court to enlarge time for this purpose. Since the time limited for appealing has long since expired, the appeal was not properly before the Court. The appeal against the second issue is dismissed.

Since we have allowed the appeal on the first issue raised in the preliminary objection but dismissed the appeal on the second issue, we will not make any order as to costs in the appeal.

Deposit to be returned to appellant.

Also found at [1991] 1 CLJ 266